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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 415

JAMES GASTON,
Petitioner,

JOSEPH ROBINSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

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To the Honorable Chief Judge and Associate Judges of the Supreme Court:

The petitioners, addressing themselves to the court through their counsel, T. Emmett McKenzie, of Washington, D.C., pray that they be granted a rehearing of their petition for writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit, entered on June 18, 1958.

The petition for writ of certiorari was denied by this Court November 24, 1958.

JURISDICTIONAL STATEMENT

Petitioners petition for rehearing upon the grounds made available in Rule 58 (2) of the Rules of this Court;

and more particularly upon the basis the petition for rehearing relates to other substantial grounds available to the petitioners although not previously presented.

QUESTION PRESENTED IN THIS PETITION AND NOT HERETOFORE PRESENTED

In the trial Court the petit jury which brought in the verdicts in this cause was comprised of eight (8) jurors employed by the federal government and four jurors in private employment.

This fact was known to the trial judge by reason of a list of jurors furnished the trial judge, the trial clerk and trial counsel, upon which appeared the name of the member of the panel; his age; whether he worked for government or private industry; the name of his particular employer; his age; his address.

The trial judge judicially knew that each petit juror who was employed by the federal government had taken an oath of office prior to entering upon employment for the federal government.

The admissions by the government employed petit jurors that they had violated the gaming laws enacted by the Congress was evidence of a violation of the oath of office, as more fully appears infra.

Petitioners contend that where petit jurors are exhibited to the trial judge for consideration as to their qualifications under such circumstances it is error and a denial of the guarantee of a fair and impartial jury to:

(a) Refuse to permit counsel for defendants to inquire, on voir dire, respecting such misconduct as basis for a showing as to bias, prejudice, or lack of moral qualification; or

(b) To inquire into such a state of mind and behavior himself upon request of counsel for defendants.

STATEMENT OF THE CASE AND ARGUMENT

Prior to being impannelled the trial judge advised the prospective trial jurors that each had a right to decline to answer questions relating to their personal gambling activities in the event any juror deemed such an answer would incriminate him.

He had declined to personally conduct an examination as to the extent, nature and effect of gambling as to those jurors who had admitted gambling within the District of Columbia in manner and form prohibited by statute.

He had, at first, granted permission to counsel for defendant to conduct such an examination; but later revoked that permission when it became apparent from 85% to 90% of the entire panel were gamblers.

He personally asked, in substance, whether, in the opinion of each juror, his own gambling activities had so affected him as to prevent him from rendering a fair and impartial verdict—and this question comprised the sole and entire inquiry into this matter.

In the United States District Court for the District of Columbia, trial juries for criminal causes are selected once each month, and each criminal court has a panel of 26 prospective jurors assigned to it for any given month.

Each panel of 26 prospective jurors is set up on a printed list in form and fashion as follows:

JUDGE: ..... CASE NO. ..... DAYS ON TRIAL.....
JURORS—CRIMINAL COURT NO. ..... Month ..... 1958.

1. John Doe Govt. 57 1 Unit St. Chief Clerk, Treas. Dept.

A copy of this list is at all times before the trial judge; the clerk of the trial court; and counsel for both government and defense. So that each of these parties knows at all times the name of each juror; whether he works for the federal government; if so, where; his age and address.

In the instant cause the jurors selected and the alternates chosen where as follows, ages and residence omitted.

1.	John W. Stenhouse	Private employment
2.	John J. Halloren	Clerk P.O.
3.	Doris C. Richardson	Clerk G.S.A.
4.	Warren L. Montoney	Naval Research Metal worker.
5.	Melvin L. Mesnard	Private employment
6.	Giles S. Mattingly	Private employment
7.	David F. Lyles	Clerk P.O.
8.	Ralph H. Jones	Mechanic, Commerce Dept.
9.	Hardy B. Jones	Messenger, Treas.
10.	Walter C. Jackson	Lithographer, Commerce Dept.
11.	Hilda M. Bender	Private employment
12.	Emmett T. Benson	Requirements officer, U.S. Info. Agency.

Ergo, eight of the twelve jurors in the instant case were employees of the federal government.

Each employee of the federal government had taken the following oath of office prior to entering upon his duties as an employee of the Government of the United States of America.

> I will support and defend the Constitution of the United States against all enemies, foreign and domestic: That I will bear true faith and allegiance to the same; That I take this obligation freely without any mental reservation or purpose of evasion: That I will well and faithfully discharge the duties of the office on which I am about to enter, so Help Me God.

It will be immediately evident that one who has taken this Oath of Allegiance and who subsequently consistently and progressively pursues a course of conduct or mode of life which involves offenses against the penal laws of his government, has violated each and every clause set forth in said Oath of Allegiance.

For how can one support and defend the Constitution who assumes the right to violate the penal laws enacted

pursuant thereto for the protection of the government and of the citizens?

How can one be said to be defending the Constitution against all domestic enemies, when his infractions of the penal laws aforesaid, furnish the impetus and supply the financial requirements of those organizations and individuals whose avowed purpose it is to nullify the laws enacted pursuant to the Constitution?

How can one be held to be bearing true faith and allegiance to a government whose statutory enactments he deliberately and habitually flouts and defies?

How can one whom, having taken the oath aforesaid, pursues such a course of conduct be held to have taken his oath without any mental reservation or purpose of evasion?

How can one who makes such solemn Oath before God and who thus violates it be deemed trustworthy in taking the oath of a juror?

At the trial level the trial judge knew with exactitude how many, and whom, were government employees on the panel, and he knew, judicially, they had taken the required oath of office.

This being so it cannot be asserted he lacked knowledge of the fact 75% of the trial jurors had been admittedly false to one oath taken with respect to government service; nor can it be seriously maintained that a wise exercise of judicial discretion would have demanded interrogation designed to determine whether such jurors were unfit by reason of bias or prejudice or lack of moral qualification.

The question thus presented has not been heretofore before the Court as far as the research of petitioner has revealed.

Yet similar situations, bearing upon the question have been adjudicated.

In Dennis v United States, 339 U.S. 162, 168, 171-172, 94 L ed. 734, 70 S Ct. 519, this Court, spoke, in part, as follows:

> No question of actual bias is before us. The way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact. In both the Wood and Frazier cases this Court stressed that while impaneling a jury the trial court has a serious duty to determine the question of actual bias, and a broad discretion in its rulings on challenges therefor. United States v Wood, supra, 133-134, 150; Frazier v United States, supra, 511-512. We reaffirm those principles. In exercising its discretion, the trial court must be zealous to protect the rights of an accused. • • •
>
> As far as it appears, the Court was willing to consider any evidence which would indicate that investigatory agencies of the Government had recognized in the past or would take cognizance in the future of a vote of acquittal, but no such proof was made • • •.

How different the situation in the instant case, where, the trial court was not only not willing to consider any evidence which would indicate lack of qualifications; but determined not to permit any evidence of that constitutionally required condition to be adduced—in any wise.

And, animadverting to Dennis v United States, supra, pp. 171-172, we read:

> Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.

Is it not established, beyond possibility of successful contradiction that in the instant cause this guarantee was destroyed by the action of the trial court in denying petitioner any opportunity to prove lack of qualifications?

Again, this Court, in Morford v United States, 339 U.S. 258, 259, 94 L ed. 815, 70 S Ct. 586, *held*, as follows:

In this case the trial court would not permit counsel for petitioner to interrogate prospective government employee jurors upon voir dire examination with specific reference to the possible influence of the "Loyalty Order", Executive Order No. 9835, on their ability to render a just and impartial verdict. Such questioning was permitted in Dennis v United States, ante, p. 162; see n. 4 of the Court's opinion, ante, pp. 170-171.

We said in Dennis that "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." Ante, pp. 171-172. Since that opportunity was denied in this case, the petition for writ of certiorari is granted and the judgment of the Court of Appeals is reversed.

To petitioner it appears that his case agrees in every respect with the situation presented in Morford v United States, supra; and that in addition to the question of bias and prejudice there was in his case a pressing need to inquire into moral qualifications also so that the denial of the opportunity to make appropriate inquiry becomes a more flagrant denial of the constitutional guarantee.

A further factor which petitioner is inclined to believe this court knows judicially is the disturbing and alarming fact that substantially large percentages of our population do not subscribe to the liberties we have been guaranteed in what has come to be known as the "Bill of Rights", and that very probably from 30% to 40% of our citizenship is actually hostile to the ideas and procedures embodied in a fair trial under due process of law.

Every sign and portent and every bit of evidence and testimony contained in the record of the instant cause demands, in the petitioner's view, an inquiry by this Court.

At the very least the procedure followed in this cause, below, chipped away a material part of petitioner's guarantee of trial by an impartial jury and of petitioner's guarantee to a fair trial under due process of law—and at

the most the procedure was tantamount to a judicial declaration that as to the petitioner the Constitution had been repealed by judicial fiat.

This Court has upon many occasions stated that in criminal trials brought in the name of the United States of America, courts must strictly observe and honor the defendant's Constitutional Rights, *in toto.*

It is submitted that what has happened in this cause is plain and substantial error and that unless corrected that error may well serve as a precedent through the medium of which all defendants in criminal causes brought in the federal courts in the name of the United States may be deprived, summarily, of the opportunity to a trial by an impartial jury.

The Constitution was written by and for people who had absolute and vigorous respect for constitutional liberty.

Its efficacy, today, as a guarantee of the rights and privileges enumerated in the Constitution is threatened by a belief such fundamental principles as are embodied in the Bill of Rights need not, and should not, be regarded as binding.

The best evidence of such a belief is the admissions of persons who have, admittedly, by their conduct, ignored and contumaciously repudiated solemnly taken constitutional oaths of allegiance.

Where such state of mind is made to affirmatively appear, is it not the duty of appellate courts, in the interest of orderly judicial proceedings, to intervene and inquire into the effect of such condition upon due process of law?

Certainly it violates constitutional guarantees to ignore the phenomena.

CONCLUSION

Petitioners respectfully urge the Court upon consideration of the petition herein submitted to Order a review of the entire case through certiorari.

Respectfully submitted,

T. EMMETT McKENZIE,
412 Fifth Street, N.W.,
Counsel for Petitioners.
Washington, D.C.,

CERTIFICATE OF GOOD FAITH

T. Emmett McKenzie, counsel for petitioners, hereby certifies that he presents the instant petition for rehearing in good faith and does not file the same for purposes of delay, & that the petition is restricted to the grounds specified in Rule 58.

T. EMMETT McKENZIE